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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS H. THORNER, *et. al.*,
Cross-petitioners,

v.

WYNEMA ANNA CROSS, EXECUTRIX, *et al.*,
Cross-respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE CROSS-PETITIONERS

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REPLY BRIEF FOR THE CROSS-PETITIONERS

ARGUMENT

1. In their Brief in Opposition to Cross-Petition, cross-respondents have not responded to a single reason advanced in the cross-petition for granting review of the first question presented—whether the limitations period contained in Section 9(e) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78i(e), requires an investor to commence an action for violation of Section 10(b) within one year of actual discovery of the facts constituting the violation, as opposed to one year after the investor, in the exercise of reasonable diligence, should have discovered the

facts constituting the violation. In the cross-petition, we demonstrated that the original decision of the Tenth Circuit on this issue (1) conflicts with this Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991); (2) conflicts with decisions of the Second and Third Circuit Courts of Appeals; and (3) conflicts with the 1934 Congress' stated rationales for enacting the one-year provision of Section 9(e). Through their silence, cross-respondents implicitly concede these conflicts.

Lampf did not, as cross-respondents state, "simply recite the operative terms" of Section 9(e) (Br. in Opp. 4). The Court held that an action under Section 10(b) "must be commenced within one year after the discovery of the facts constituting the violation . . .," 111 S. Ct. at 2782, and rejected the application of the doctrine of equitable tolling to Section 9(e):

> The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary.

Id. The Tenth Circuit's original decision, which relies on the doctrine of equitable tolling to read an "inquiry notice" standard into Section 9(e) (App. 54a, n.5),[1] conflicts with both the holding and the underlying reasoning of *Lampf*.

Our cross-petition also pointed out that the Tenth Circuit's original decision was in conflict with *Gruber v. Price Waterhouse*, 911 F.2d 960, 964 n.4 (3rd Cir.

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[1] "App." refers to the separately bound appendix to the pending petition for a writ of certiorari in *William H. Dennler, et al. v. Robert S. Trippet, et al.*, No. 92-1003, filed December 11, 1992.

1990) and *Ceres Partners v. GEL Associates*, 918 F.2d 349, 361-64 (2d Cir. 1990). Cross-respondents have not even cited those cases, much less attempted to explain why there is no conflict on the interpretation of Section 9(e).[2] They instead rely on pre-*Lampf* cases applying the doctrine of equitable tolling and borrowed state-law statutes of limitations to Section 10(b) claims,[3] a practice overruled by *Lampf*.

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[2] Our cross-petition also cited several well-reasoned district court decisions since *Lampf* holding that the one-year limitation period of Section 9(e) commences upon actual discovery (Cross-Pet. 8-9). In response, cross-respondents argue that *Hauman v. Illinois Power Co.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,882 (C.D. Ill. 1991), is "simply wrong" and also fail to distinguish the remaining district court decisions, arguing only that they were decided on motions to dismiss (Br. in Opp. 8).

[3] *Ebrahimi v. E.F. Hutton & Co.*, 852 F.2d 516, 523 (10th Cir. 1988); *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988); *Volk v. D. A. Davidson & Co.*, 816 F.2d 1406, 1411-12 (9th Cir. 1987); *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970) (Section 7 of the 1934 Act); *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 8-10 (5th Cir. 1967).

Cross-respondents also rely on several cases applying equitable tolling to non-securities federal claims. *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979) (Federal Tort Claims Act); *Alcorn v. Burlington N. R.R.*, 878 F.2d 1105, 1108 (8th Cir. 1989) (NLRA); *Trotter v. International Longshoremen's and Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983) (Labor Management Reporting and Disclosure Act); *NLRB v. Allied Products Corp.*, 548 F.2d 644, 650-51 (6th Cir. 1977) (NLRA). They are irrelevant to the narrow issue presented in the cross-petition.

Similarly, the cases cited by cross-respondents interpreting state common law fraud limitations periods, *Kropinski v. World Plan Executive Council-US*, 853 F.2d 948, 955-56 (D.C. Cir. 1988) and *Sade v. Northern Natural Gas Co.*, 483 F.2d 230, 235 (10th

Rather than address *Gruber* and *Ceres*, cross-respondents miscite two other appellate decisions involving Section 9(e). *Rosenberg v. Hano*, 121 F.2d 818 (3d Cir. 1941) did not, as they assert, interpret the one-year period in Section 9(e) to begin running when the investor, in the exercise of reasonable diligence, should have discovered the fraud (Br. in Opp. 5). *Rosenberg* expressly noted that Section 9(e) "omitted" the reasonable diligence standard included by Congress in Section 13 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77m, but declined to decide the issue presented here. 121 F.2d at 821.

Cross-respondents next assert that in *Walck v. American Stock Exchange, Inc.*, 687 F.2d 778, 792 (3d Cir. 1982), *cert. denied*, 461 U.S. 942 (1983), "the court explained that the one-year discovery rule in Section 9(e) was triggered when 'plaintiff discovered (or should have discovered) the wrong' " (Br. in Opp. 5-6). What cross-respondents quote, however, is the appellees' argument in *Walck* concerning tolling of the three-year provision of Section 9(e), not the Third Circuit's holding on the one-year limitations provision. (687 F.2d at 792). In fact, the court rejected equitable tolling of Section 9(e)'s three-year limitation period

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Cir. 1973), are irrelevant to the interpretation of a federal limitations statute such as this where Congress has expressly distinguished between limitations periods based on discovery and ones requiring reasonable diligence to make discovery. The other nine equitable tolling cases cited by cross-respondents in footnotes 5 and 7 of their opposition are similarly irrelevant.

Cross-respondents' citation to *Talmadge v. United States Shipping Board*, 54 F.2d 240, 243-44 (2d Cir. 1931) (Br. in Opp. 7) is actually misleading. There, plaintiffs knew of the wrong. Only their knowledge of the extent of their losses was in question.

and stated that the one-year limitations period is tolled until discovery:

> Section 9(e) essentially enacts a one-year limitation, tolled until discovery, but erects a complete bar after three years. . . . We must "give effect to the statute as enacted" and "respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction."

Id. (Citations omitted).[4]

Cross-respondents argue that commencement of Section 9(e)'s one-year limitations period does not require "complete knowledge of all the facts" or "full exposition of the fraud itself" (Br. in Opp. 7). The argument is a red herring. The degree to which the fraud has been discovered is not at issue here, and nowhere in its opinion does the Tenth Circuit suggest that cross-petitioners discovered any part of Home-Stake Production Company's fraud more than one year before suit was filed. Rather, the question is whether the Tenth Circuit correctly read into Section

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[4] Cross-respondents (Br. in Opp. 6) also cite *Goldenberg v. Bache & Co.*, 270 F.2d 675, 681 (5th Cir. 1959), where the Fifth Circuit read a "reasonable diligence" standard into Section 29(b) of the 1934 Act. As Professor Loss has observed, *Goldenberg* ignored the contrast between Section 13 of the 1933 Act and Section 29(b). *See* L. Loss, *Fundamentals of Securities Regulation* 991 (2d ed. 1988). Moreover, the Fifth Circuit relied principally on the doctrine of equitable tolling announced in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), which *Lampf* rejected as applied to Section 9(e). 111 S. Ct. at 2782.

9(e) a provision that the one-year statute begins when the investor through the exercise of reasonable diligence should have discovered the facts constituting the violation.[5]

The cross-petition demonstrated that the Tenth Circuit's interpretation of Section 9(e) in its original decision is also inconsistent with the two rationales articulated by Congress in enacting the one-year statute. Those rationales, avoiding investor "hedging" and prolonged threat of suit, make sense only where the claim is known to the investor (Cross-Pet. 10-11). Cross-respondents urge the Court to ignore the legislative history (Br. in Opp. 8-9), citing *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 118 (1980), and *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), both of which wrestled with the same "isolated" remarks of a single legislator, Rep. Moss, during the Congressional debates leading to enactment of the Consumer Product Safety Act. By contrast, the remarks of all the principal proponents of the 1934 Act, Senators Fletcher, Barkley and Kean, demonstrate that Congress intended the one-year limitations period of Section 9(e) to commence upon actual discovery. 78 Cong. Rec. 8198-8201 (1934). *See also* remarks of Senator Byrnes, 78 Cong. Rec. 8200 (1934).[6]

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[5] Cross-respondents' repeated use of the term "constructive discovery" further confuses the issue. (*See* Br. in Opp. 3-4, 6-7). Neither the Tenth Circuit nor any of the authorities cited by cross-respondents uses the term, much less defines it.

[6] Cross-respondents elsewhere miscite commentators' interpretations of the legislative history, arguing that Congress inadvertently omitted a reasonable diligence standard from Section 9(e). (Br. in Opp. 6, n.6). The authorities they cite do not support

Cross-respondents argue that "*Lampf* is consistent with the plain language of Section 9(e) as well as the legislative history as a whole" (Br. in Opp. 9). We agree. It is the Tenth Circuit's interpretation of Section 9(e) that is at odds with the plain wording of the statute, the holding and rationale of *Lampf*, de-

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that interpretation, however. Professor Loss nowhere suggests an "oversight"; on the contrary, he notes the "contrast" between Section 13 of the 1933 Act and the various limitations provisions found in the 1934 Act. L. Loss, *Fundamentals of Securities Regulation* 991 (2d ed. 1988). *See also* L. Loss and J. Seligman, *Securities Regulation* 4280 (3d ed. 1992) (recognizing differences between Sections 9(e) and 13).

Professor Bloomenthal, in his treatise *Securities Law Handbook*, §30.02 at 30-16 (1993), essentially admits that the legislative history does not support the theory that the difference between Section 9(e) and Section 13 is merely the result of an "oversight":

> The debate over these provisions [Sections 9(e) and 18(c)] generally assumed that actual discovery or something that would put one on notice of the fraud would be required which may be inconsistent with the specific language of Section 13.

In another treatise, Professor Bloomenthal retreats further from the "oversight" theory: "The reasons for the difference in language are not clear and may or may not have been an oversight." 3B Bloomenthal, *Securities and Federal Corporate Law* §9A.10 at 9A-27 (1992).

Cross-respondents suggest that the 1934 Congress intended to "conform" Section 13 of the 1933 Act to Section 9(e) of the 1934 Act (Br. in Opp. 6 n.6). While Congress clearly sought to make the actual time periods of the two Acts consistent (*i.e.*, one year/three years), 78 Cong. Rec. 8198 (1934), nothing in the legislative history suggests an intention by Congress to conform the explicit tolling provisions of the two Acts (*id.* at 8195-8203).

cisions of other courts of appeals, and Congress' intent.

2. Cross-respondents' response to the second question raised in the cross-petition (Br. in Opp. 10-16) is substantially identical to their response to the first question presented in *Dennler v. Trippet*, No. 92-1003. Cross-petitioners incorporate by reference their reply in that case.

3. Cross-respondents' response to the third question raised in the cross-petition (Br. in Opp. 17-20) is also substantially the same as their response to the second question presented in *Dennler v. Trippet*. Cross-petitioners incorporate by reference their reply in *Dennler v. Trippet* on that point as well. *See also* L. Loss, *Fundamentals of Securities Regulation* at 331 (1992 Supp.) (discussing the conflict in the circuits on the issue of whether estoppel may extend the three-year limitations period of Section 13 of the 1933 Act and citing the conflict between *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1055-56 (2d Cir. 1969) and the Tenth Circuit's decision in this case).

CONCLUSION

Cross-petitioners oppose cross-respondents' petition for a writ of certiorari to review the constitutionality of Section 27A of the 1934 Act. Should the Court choose to grant their petition on that issue, however, the cross-petition should be granted as well and the issues raised therein should be considered before addressing any constitutional question.

Respectfully submitted,

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